Supreme Court, U.S.
FILED

98 964 DEC 11 1998

OFFICE OF THE CLERK

No. 98-__

IN THE

# Supreme Court of the United States

October Term, 1998

DILAWAR M. EDWARDS, Ph.D.

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:
Brad Dacus, Esq.
Pacific Justice Institute
9845 Horn Road #190
Sacramento, CA 95827
(916)857-6900

Craig L. Parshall
*Counsel of Record*
Law Office Of Craig L. Parshall
910 Princess Anne Street
Suite 202
Fredericksburg, VA 22401
(540)371-5427

Balmar Legal Publishing Services, Washington, DC (202) 692-9800

58 pp

## QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals was correct in its holding that the First Amendment provides no protection for in-class teaching by professors at public universities.

2. What is the standard of review applicable to the actions of university administrators who override the professional judgment of a tenured professor in censoring his teaching materials based on opposition to the viewpoint of the professor and his classroom materials.

3. Does a public university professor have an academic freedom right under the First Amendment, sufficient to prevail against the viewpoint-based objections of the university, to use materials that purportedly espouse religious ideas, where the materials are relevant to the course, are presented in an objective and educationally appropriate way, and are consistent with the official academic freedom policy of the university?

## PARTIES TO THE PROCEEDINGS

California University of Pennsylvania was a party at the District Court level, and was dismissed at summary judgement on Eleventh Amendment grounds. The remaining Respondents listed in the caption were parties to the proceedings in the court below.

In addition, Dr. Angelo Armenti, the current President of the University at the time of trial, was automatically substituted as a party for purposes of Petitioner's request for injunctive relief under Fed.R.Civ.P. 25 (d)(1).

The Petitioner is properly listed in the caption, and is not a corporation for purposes of Supreme Court Rule 29.6.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 7

I. WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO CLARIFY THE CONSTITUTIONAL BASIS OF ACADEMIC FREEDOM ..... 9

A. THE COURT OF APPEALS MISTAKENLY ASSUMED THAT INDIVIDUAL PROFESSORS HAVE NO FIRST AMENDMENT PROTECTION FOR THEIR IN-CLASS SPEECH ..... 9

B. ACADEMIC FREEDOM HAS BEEN INCONSISTENTLY DEFINED HISTORICALLY BOTH IN TERMS OF INDIVIDUAL RIGHTS AS WELL AS INSTITUTIONAL RIGHTS ..... 10

C. BOTH THE CONTOURS OF ACADEMIC FREEDOM AND THE CONFLICT BETWEEN THE RIGHTS OF INDIVIDUAL PROFESSORS AND ACADEMIC INSTITUTIONS NEED CLARIFICATION ..... 12

II. THERE IS A SPLIT OF AUTHORITY AS TO THE PROPER STANDARD OF REVIEW FOR THE CLASS-ROOM TEACHING OF A PROFESSOR IN A PUBLIC UNIVERSITY ..... 16

**Page**

A. THE *HAZELWOOD* CASES ..... 16

B. THE *CONNICK-PICKERING* CASES ..... 19

C. THE "PER SE" RULE OF THE THIRD CIRCUIT ..... 21

D. THE OTHER TESTS APPLIED TO CURRICULUM-RELATED EXPRESSION OF PROFESSORS IN THE CLASSROOM ..... 23

E. THE "SUBSTANTIAL DEPARTURE" TEST ..... 23

III. THE THIRD CIRCUIT OPINION PERMITS A PUBLIC UNIVERSITY TO SELECTIVELY COMMIT VIEWPOINT CENSORSHIP AS TO UNPOPULAR VIEWPOINTS WHILE DELEGATING ACADEMIC FREEDOM TO POPULAR ONES ..... 25

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

**CASES** **Page**

*Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. ___, 118 S.Ct. 1633, 118 S.Ct. 1633 (1998) ..... 27

*Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) *cert. den.* 505 U.S. 1218 (1992) ..... 17

*Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)(en banc), *cert.den.* ___ U.S. ___ (1998) ..... 21

*Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) ..... 20, 21

*Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) ..... 13, 23

*Connick v. Myers*, 461 U.S. 138 (1983) ..... 18-20

*Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ..... 20

*Edwards v. Aguilard*, 482 U.S. 578 (1987) ..... 12

*Edwards v. California Univ. of Pa.*, 156 F.3d 488 (1998), *reh.den.* _____ F.3d ____ (3rd Cir. 1998) ..... 21, 22

*Harleston v. Jeffries*, 513 U.S. 996 (1994), *cert.granted and vacating Jeffries v. Harleston*, 21 F.3d 1238 ..... 20

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), *on remand* 840 F.2d 596 ..... 7, 16

*Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.), *cert.den.*, 457 U.S. 1106 (1982) ..... 13

*Keyishian v. Board of Regents*, 385 U.S. 589 (1967) ..... 8, 9, 11, 12, 27

*Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) ..... 18

*Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) ..... 17

*Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) ... 18, 19

**CASES** **Page**

*National Endowment for the Arts v. Finley*, 523 U.S. ___, 118 S.Ct.168 (1998) ..... 28

*Parate v. Isibor*, 868 F.2d 821(6th Cir. 1989) ..... 23

*Perry Educ. Ass'n. v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) ..... 16, 25

*Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625 (7th Cir.), *cert.den.*, 474 U.S. 1007 (1985) ..... 13

*Pickering v. Board of Educ.*, 391 U.S. 563 (1968) ..... 18-20

*Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978) ..... 22

*Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) ..... 9, 10, 22, 24, 25

*Rosenberger v. University of Va.*, 515 U.S. 819, (1995) ..... 22, 25, 26

*Rust v. Sullivan*, 500 U.S. 173 (1991) ..... 26

*Silano v. Sag Harbour*, 42 F.3d 719 (2nd Cir. 1994) ..... 18, 19

*Silva v. University of N. H.*, 888 F. Supp. 293 (D.N.H. 1994) ..... 17, 18

*Sweezy v. New Hampshire*, 354 U.S. 234 (1957) ..... 11

*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) ..... 16

*University of Pa. v. EEOC*, 439 U.S. 182 (1990) ..... 24

*Ward v. Hickey*, 998 F.2d 448(1st Cir. 1993) ..... 18, 19

*Waters v. Churchill*, 511 U.S. ___, 114 S. Ct. 1978 (1994) ..... 20

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Constitution, Amendment 1 ..... *passim*

42 U.S.C. Sec. 1983 ..... 6

Fed.R.Civ.P. 25 (d)(1) ..... ii

## OTHER AUTHORITIES

**Page**

AAUP, *Policy Documents and Reports* (1990) .....8, 15

J. Peter Byrne, *Academic Freedom: a Special Concern of the First Amendment*, 99 Yale L. J. 252 (1989) .....14

D. Grant Carwile, *Constitutional Law - Freedom of Religious Speech - When Freedom of Speech in The Classroom Conflicts with the Establishment Clause*, 14 U. Ark. Little Rock L. J. 83(1991).....13, 14

Neil Hamilton, *Zealtory and Academic Freedom* (1995).....14

Allen Charles Kors, Harvey A. Silverglate, *The Shadow University - The Betrayal Of Liberty On America's Campuses* (1998) .....13

Note, *Academic Freedom and the University Title VII Suit after University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University*, 43 Vand. L. Rev. (1990) .....14

Note, *Beyond "The Freedom to do Good and not Teach Evil": Professor's Academic Freedom Rights in Classrooms of Public Higher Education*, 26 Wake Forest L. Rev. 711, 733 (1991).....14

Note, *Bishop v. Aronov: Religion-Tainted Viewpoints are Banned from the Marketplace of Ideas*, 49 Wash. & Lee L. Rev. 1557, 1557-58 (1992).....14

Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. Chi. L. Rev. (1992) .....15

Donna Prokop, *Controversial Teachers Speech: Striking A Balance Between First Amendment Rights And Educational Interest*, 66 S. Cal. L. R. 2533 (1993) .....13

**Page**

David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law & Contemp. Probs. 227 (1990) ..... 14, 27

Harry F. Tepker, Jr., Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes And The Blurred Limits of Academic Freedom*, 50 Okla. L. R. 1 (1997) ..... 13

Mark G. Yudof, *When Government Speaks: Politics, Law And Government Expression In America* (1983) ..... 27

No. 98-__

IN THE

# Supreme Court of the United States

October Term, 1998

---

DILAWAR M. EDWARDS, Ph.D.

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Dilawar M. Edwards, Ph.D., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The Court of Appeals' published decision of August 10, 1998 is reported at 156 F.3d 488 (3d Cir. 1998) (Appendix A -1) (hereafter App.).

## JURISDICTION

Judgment was entered on August 10, 1998 by the Court of Appeals affirming the judgment of the District Court which had been entered on April 16, 1997 (App. B-1). The Petitioner filed a timely Petition for Rehearing and Suggestion For

Rehearing In Banc, and the Court of Appeals denied the Petition on September 14, 1998. (App. C-1).

Jurisdiction of the Court is conferred under 28 U.S.C. sec. 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Petitioner is a veteran, tenured professor at the Respondent's University. App. A-2. Dr. Edwards received his Ph. D. from Indiana University specializing in Instructional Systems Technology. He has had a long and distinguished career with the Respondent University, including serving as past chairman of his department, and activities on numerous professional committees and projects of the University. App. Vol. I, 478-483. At the heart of this case is the "cease and desist" ban imposed by the Respondents on his selection of certain books and other classroom materials in one of the courses he regularly taught - Introduction to Educational Media ("IEM"). Id., A-3 & 4.

During the relevant time Dr. Edwards taught and developed syllabi[1] for this advanced undergraduate class. The University

---

[1] Unit three of his IEM class is central to this case. A summary of slight syllabi changes over the years is attached at App. C-1. This should be contrasted with the Court of Appeal's misperception that Dr. Edwards created a "new emphasis" on such matters as bias, censorship, and religion. See: App. A-3. Dr. Edwards had been previously praised by his department chair for the syllabi, and commended by Respondent Nelson.

operates under a written Collective Bargaining Agreement ("CBA")[2] with the faculty. In the CBA the academic rights of the faculty regarding both classroom discussion and the selection of textbooks and other written class materials were expressly set-forth. That document indicates:

> B. A FACULTY MEMBER is entitled to freedom in the classroom in discussing his/her subject, but he/she should be careful not to introduce into his/her teaching controversial matter which has no relation to his/her subject.
>
> D. 1. FACULTY MEMBERS are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids.

App. Vol. I, 281; App. Vol. I, 287.

According to the President of the University, the CBA was the "primary guiding document" governing the University. App. Vol. IV, Tr. Feb. 20, at 6. (Armenti). President Armenti stated that professors are permitted to make the decision of whether certain materials are relevant enough to include them in a course. App. Vol. III, Tr. Feb. 19 at 162. Individual faculty members have "extraordinary latitude" in making those decisions. App. Vol. IV, Tr. Feb. 20, at 19, L4-6 and L9-10 (Armenti).

Yet surprisingly, in 1989 the Vice President for Academic Affairs (Respondent Nelson) issued a written directive to Dr. Edwards to "cease and desist" using "doctrinaire material" "of a religious sort" in his IEM class.

---

App. Vol. IV, Tr. Feb. 20 at 84-86; App. Vol. II, Tr. Feb. 12 at 73-75; App. Vol. III, Tr. Feb.19 at 87-89. A national educational accrediting organization which reviewed the University's syllabi had no criticisms of Petitioner's. App. Vol. IV, Tr. Feb. 20 at 74.

[2] Petitioner relied on the CBA in his arguments before the Third Circuit. Appellant's Brief ("Ap. Br."), 9-10, 29, 43, n.5. The Court of Appeals opinion, however, omitted any reference to the CBA, and failed to discuss its potential impact on the issue of the Respondent's blatant viewpoint censorship of Dr. Edwards.

App. A-3; App. Vol. I at 366. The ban applied to a list of twenty four titles[3] of suspect materials (*Id.*), that had been previously listed by name in a prior written notice from Nelson. App. Vol. I, 359. Nelson's actions were approved by the President of the University. App. A-4.

The actions taken against Dr. Edwards were due to the administration having received a single complaint by a single student in his IEM class. Id., A-3. However, the evidence at trial indicated that this complaint was a mere pretext for the Respondents' actions. The unanimous testimony of three students from Petitioner's IEM class was that Dr. Edwards did not proselytize, he used the materials appropriately, and his religious beliefs were not apparent in his conduct of the classes. App. Vol. III, Tr. Feb. 18 at 59-67 (Bryne); App. Vol. II, Tr. Feb. 12 at 160-167 (Post); App. Vol. III, Tr., Feb. 19, 143 (Landy). The Respondents presented no student testimony, not even the original complaining student.

At trial Dr. Edwards presented expert testimony from three professors from other academic institutions who testified that the materials used were relevant to the IEM class, and were within the traditional norms of academic freedom in a university setting. App. Vol. III, Tr. Feb. 18 at 27 (Dr. Smellie); App. Vol. II, Tr. Feb. 13 at 109 and 120-121 (Dr. Brown); App. Vol. III, Tr. Feb. 18 at 106 (Dr. Rothman).

---

[3] One of the books listed, and ultimately banned, ironically was a book by nationally syndicated columnist Cal Thomas, titled *Book Burning*. App. Vol. I, 359. The book warned of the "subtle repression of alternative viewpoints to secularism" by such means as marginalizing a speaker by imposing the label of "fundamentalist." App. Vol. I, 342, 343. The Respondents used this method of repression against the Petitioner in blatant disregard of the CBA and the First Amendment. Respondents also targeted for censorship a book on free speech issues by attorney John Whitehead, and various materials used by Petitioner to illustrate the public debate surrounding curriculum-related issues, including the teaching of evolution, humanism, and the role of religion and parental authority in education and culture. App. Vol. I, 359-360.

Other than the testimony of Respondents themselves, no testimony was presented rebutting Petitioner's experts. [4]

In 1993, at a meeting at which Dr. Edwards was absent, Respondent Campbell, without authority, and as the new chair, revoked Dr. Edwards' IEM syllabus and later cancelled his book orders. App. A-4. App. Vol. III, Tr. Feb 18, 149., Vol. II, Tr. 13, 61-62. This action was unprecedented in the University, according to President Armenti. App. Vol. III, Tr. Feb. 19, at 172, 174.

Interestingly, from 1989 up until Campbell's intervention in the Spring of 1993, no objections had ever been raised about Petitioner's syllabi. App. Vol. III Tr. Feb. 19, 125-126. There were no written policies requiring that a syllabus, even one that was substantially revised, be approved by a faculty department (or by a Chair of the deparment, such as Respondent Campbell). App. Vol. III, Tr. Feb. 19, 170. As a result of Campbell's actions, a prior, ten year old syllabus for the IEM class was adopted by the department, in place of Dr. Edwards most current, 1991 one. App. Vol. II, Tr. Feb. 13, 61-62. Campbell used the revocation of Petitioner's syllabus as the pretext for his revocation of his IEM class book orders in the Summer of 1993. App. Vol. III, Tr. Feb. 18, 178.

The pretextual nature of these actions is clear: even the 1983 IEM syllabus resurrected by Campbell's efforts contains, in unit three, subject study in "textbook evaluation" and "criteria and guidelines to be used in media selection" for teachers (App. Vol. I, 305-306). In fact, all of the syllabi in

---

[4] Dr. Edwards had developed a syllabus for IEM that contained, in unit three, discussion and readings on censoring and bias (including anti-religious bias) in the selection of classroom teaching materials E.g. App. Vol. I, 317-318. However, even Respondent Nelson conceded, in an October 6, 1989 meeting with Edwards' that "[s]he thought that censorship of media was appropriate to teach in this course . . . " App. Vol I, at 364 (top sentence) (minutes of meeting).

the record for the IEM class show that similar areas of study were always part of unit three of the class. App. D-2, 3.

Thus, Dr. Edwards disputed materials were always relevant to each IEM syllabus and the IEM course. Moreover, the practice in Petitioner's department was to assign "to those who regularly teach a given course" the authority to make any revisions deemed appropriate by that professor. App. Vol. I, 349-350 (memorandum on "updated syllabi" granting Dr. Edwards the authority for review and any of revision of "Ed. Media" [IEM] syllabus). To the same effect, see also: App. Vol. I, 378,471.

At the core of the Respondents' censorship of Dr. Edwards was their intolerance toward the "fundamentalist Christian nature" of the classroom materials. App. Vol. II, Feb. 12 at 50-51, (Respondents' *Answers to Interrogatories*).

Respondent Campbell went so far as to tell Dr. Edwards that he ought to transfer to a "fundamentalist college." App. A-4. At trial the evidence also showed that department head Campbell had targeted Dr. Edwards because Campbell was "pretty convinced" of his inclusion in the "*fundamentalist*" "spectrum," as opposed to "Episcopalian, Catholic, that sort of thing, more liberal Christian faith." App. Vol. II, Tr. Feb. 13, at 191 (emphasis added).

Petitioner brought an action under 42 U.S.C. sec. 1983 against the University and several of its administration officials. Dr. Edwards asserted that the Respondents violated his First Amendment academic freedom rights by imposing the "cease and desist" ban. He also claimed a violation of his due process and equal protection rights under the Fourteenth Amendment, and further asserted that the University officials had retaliated against him because he had filed the instant lawsuit. App. A-5.

At trial, the district court dismissed the equal protection and due process claims, and following several days of testimony, the court submitted the case to the jury on the First Amendment and retaliation claims. However, the trial court

rejected most of Petitioner's proposed jury instructions on the free speech issues, which sought to define the key term "reasonable educational [pedagogical] interest," derived from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) *on remand* 840 F.2d 596, which formed the core of the jury verdict question. App. A-3, A-5. The jury ruled for the Respondents, and Dr. Edwards appealed.

In their brief before the Court of Appeals, the Respondents clearly implied that Dr. Edwards had *some* First Amendment rights regarding the materials he used in his IEM class. *Brief for Appellees*, ("Univ. Br.") 26. (Emphasis added). In its published opinion, however, the Court of Appeals ruled that, as a "threshold" matter, professors in public universities have no First Amendment interests whatsoever as to the decisions regarding "what will be taught in the classroom." App. A-6. The Third Circuit Court of Appeals' opinion, which decimates decades of constitutional law regarding academic freedom and viewpoint censorship, must be reviewed, and reversed.

## REASONS FOR GRANTING THE WRIT

Petitioner, Dr. Dilawar M. Edwards, is a respected, tenured professor. The Respondents, officials of Petitioner's university, imposed a procedurally irregular, ideologically driven ban on various classroom materials selected by Petitioner in his professional judgment because they were perceived to contain religious ideas and because Respondents labeled Petitioner as a religious "fundamentalist," while permitting all other faculty unfettered freedom to select classroom materials pursuant to the written CBA.

The Third Circuit approved this astonishing spectacle of viewpoint censorship under the even more astonishing premise that the actions of the Respondents implicated no First Amendment rights of Petitioner, while ignoring the unanimous student testimony at trial that Dr. Edwards never attempted to proselytize, and ignoring the opinions of three separate academic freedom experts that Petitioner's use of the

materials was relevant and appropriate for the class. The Third Circuit opinion is a radical obliteration of academic freedom. This Court should grant writ of certiorari in this case three reasons.

First, this startling opinion of the Third Circuit is clearly wrong. The Court of Appeals decision itself cites, as support, only cases involving curriculum-related expressive conduct of high-school teachers, rather than university professors. No case law from either the other circuits, or from this Court, has determined that a public university professor has no First Amendment interest at stake in the selection of materials used or the matters he or she discusses in class. Yet this is the remarkable holding of the Court of Appeals in this case.

Second, although there is a deep and diverse split among the courts of appeal of several circuits as to the proper standard of review applicable to in–class speech of a university professor, the Third Circuit decision is at variance with all of them.

Third, the Respondent University had adopted the widely accepted 1940 Statement of Principles on Academic Freedom of the American Association of University Professors (AAUP) in its written CBA, which granted professors the freedom to discuss even controversial matters in class as long as it has any relevance to the subject. Another provision of the Universities' CBA granted faculty "freedom in the selection of textbooks, auto-visual aids and other teaching aids." These express policies of the University created the equivalent of either a designated public forum (or at a minimum, a nonpublic forum) for First Amendment purposes. The actions of the Respondents were motivated by the desire to suppress what they saw as "fundamentalist" viewpoints, no matter how educationally relevant to the class, or objectively presented by Petitioner.

If academic freedom is to is to retain its status as "a special concern of the First Amendment" under *Keyishian v.*

*Board of Regents*, 385 U.S. 589, 603 (1967), this case must be reviewed, and reversed.

## I. WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO CLARIFY THE CONSTITUTIONAL BASIS OF INDIVIDUAL ACADEMIC FREEDOM

### A. THE COURT OF APPEALS MISTAKENLY ASSUMED THAT INDIVIDUAL PROFESSORS HAVE NO FIRST AMENDMENT PROTECTION FOR THEIR IN-CLASS SPEECH

The Third Circuit has stated:

> We do not find it necessary to determine whether the District Court's instruction adequately defines the "reasonably related to a legitimate educational interest" [*Hazelwood*] standard because, as the threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.

App. A-6.

It is clear that the Third Circuit has determined that, in any conflict between the expressive activity of a professor in a classroom regarding curriculum-related issues and the university, the rights of the university are *absolute*. However, that conclusion collides with the established academic freedom jurisprudence of this Court.

In the context of a conflict between a student who had been dismissed by the university, and the university itself, this Court noted in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's

> professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norm as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

474 U.S. 225 (citations omitted).

It is clear that in a conflict between a student who challenges the university's academic decisions, and the university itself, the university's autonomy is not absolute. Why then, in the context in the expressive academic rights of the professor, should we assume that the rights of the university are absolute?

Admittedly, *Regents of University of Michigan* utilized a "narrow avenue for judicial review" in a challenge to a university's decision to dismiss a student. *Supra*, 474 U.S. 227. Nevertheless, this Court has *never* held that there should be *no* avenue for judicial review of free speech conflicts between professors and their academic institutions.

### B. ACADEMIC FREEDOM HAS BEEN INCONSISTENTLY DEFINED HISTORICALLY IN TERMS OF INDIVIDUAL RIGHTS AS WELL AS INSTITUTIONAL RIGHTS

For several decades a First Amendment jurisprudence of this Court has developed in which academic freedom has been defined, inconsistently, as belonging to the individual professor, and, at the same time, belonging to the academic institution.[5] However, in sharp contrast to the decision of the

---

[5] As the Court of Appeals indicated in its decision below, this Court has previously noted that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself," citing *Regents of University of Michigan v. Ewing*, *supra* 474 U.S. 214, 226 n. 12 (citations omitted). App. A-8.

Third Circuit, this Court has *never* undermined the vitality of academic freedom of the individual faculty member.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) this Court noted that when it came to concerns about the danger of government censorship "in the intellectual life of the university:"

> It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.

*Sweezy, supra* 354 U.S. 261 (Frankfurter, J., concurring).

In *Sweezy*, the State of New Hampshire sought to hold a professor in contempt for failing to answer questions, posed to him by the State, relating to his political affiliations. It was the *individual* professor, not the institution, cited for contempt in that case. Thus, it is clear that the principles of academic freedom in *Sweezy* were established in the context of the plight of an individual professor, not the institutional rights of the university.

In *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967) this Court protected faculty members of a state university from the offending statute on the basis that academic freedom "is therefore a special concern of First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The Court noted, within its rhetorical question, the implications for classroom instruction when academic freedom is threatened:

> And does the prohibition of distribution of matter "containing" the [subversive] doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? . . . It would be a bold teacher who would not stay as far as possible from utterances or acts

> which might jeopardize his living by enmeshing him in this intricate machinery.

*Keyishian*, at 385 U.S. 601.

In the context of issues relating to the Establishment Clause, this Court has noted that "[a]cademic freedom," as "it is commonly understood," includes the definition used by the Court of Appeals in *Edwards v. Aguilard*, 482 U.S. 578, 585, n. 6 (1987) that:

> Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.[6]

The decision of the Third Circuit must be reviewed so that a sensible balance can be struck between the academic freedom of professors and the discretion of the university.

### C. BOTH THE CONTOURS OF ACADEMIC FREEDOM AND THE CONFLICT BETWEEN THE RIGHTS OF INDIVIDUAL PROFESSORS AND ACADEMIC INSTITUTIONS NEED CLARIFICATION

There is a compelling need for clarification of the parameters of individual academic freedom of faculty when in conflict with the academic discretion of the university.

Several Courts of Appeal have noted both the need for clarification by this Court of the nature of individual

---

[6] The Third Circuit Court of Appeals notes that this quoted language "simply describes the conclusion of the Court of Appeals in that case," and does not represent the conclusion of the Supreme Court. App. A-8 & 9, n.2. However, on a closer examination of the context of the above quote from *Edwards v. Aguilard* it is clear that the Court considered the description of academic freedom as used by the Court of Appeals in that case to have a least represented what "might, in common parlance, be understood, as referring to ... the freedom of teachers to teach what they will." *Edwards v. Aguilard*, at 482 U.S. 586.

academic freedom, and the resolution of the conflict between individual and institutional concepts of such freedom. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996) ("[n]either the Supreme Court nor this Circuit Court has determined what scope of First Amendment protection is to be given a public college professor's classroom speech"); *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 629 (7th Cir.), *cert.denied*, 474 U.S. 1007 (1985)(Judge Posner explaining that the term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government ... and the freedom of the individual teachers ... to pursue his end without interference from the academy; and these two freedoms are in conflict"); *Hillis v. Stephen F. Austin State University*, 665 F.2d 547, 553 (5th Cir.), *cert.denied*, 457 U.S. 1106 (1982)(academic freedom noted to be recognized in the case law but is ill-defined).

Academic freedom scholars have noted the need to define academic freedom, and the need to resolve the conflict between individual academic freedom of the professor and the autonomy of the university as an institution: Allen Charles Kors & Harvey A. Silverglate, *The Shadow University - The Betrayal Of Liberty On America's Campuses*, 65 (1998) ("[t]o this day the U.S. Supreme Court has not resolved the direct conflict between assertions of individual versus institutional academic freedom ... "); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes And The Blurred Limits of Academic Freedom*, 50 Okla. L. R. 1, 20 (1997)(noting the Court's "failure to provide adequate guidelines in this area," referring to in-class academic freedom rights of professors); Donna Prokop, *Controversial Teachers Speech: Striking A Balance Between First Amendment Rights And Educational Interest*, 66 S. Cal. L. R. 2533, 2538 (1993)("[t]he Supreme Court has never directly decided the degree to which the First Amendment protects teacher's in-class speech"); D. Grant Carwile, *Constitutional Law-Freedom of Religious Speech - When Freedom of Speech in The Classroom Conflicts with the Establishment Clause*, 14

U. Ark. Little Rock L. R. 83, 87 (1991)("[d]espite volumes of litigation in this general area, the Supreme Court has yet to squarely address the extent to which a public school teacher's right to freedom of expression in the classroom supersedes the right of school officials to determine course and curriculum content"); J. Peter Byrne, *Academic Freedom: a Special Concern of the First Amendment*, 99 Yale L. J. 252, 253 (1989)("The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles."); Note, *Academic Freedom and the University Title VII Suit after University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University*, 43 Vand. L. Rev. 1571, 1581 (1990); ("[a]lthough courts have been using the term 'academic freedom' since 1952, critics charge that courts have neither defined the term adequately nor expounded on which rights academic freedom protects and why")(citations and footnotes omitted).

See also: Neil Hamilton *Zealotry And Academic Freedom*, 187 (1995) ("Supreme Court cases mentioning 'academic freedom' have been few and vague. As a consequence, lower court opinions dealing with the concept have been confused and contradictory"); David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law & Contempt. Probs. 227, 281 (1990)("[n]o case to date has presented the Court with a direct conflict between institutional and individual claims of first amendment freedom"); Note, *Bishop v. Aronov: Religion-Tainted Viewpoints are Banned from the Marketplace of Ideas*, 49 Wash. & Lee L. Rev. 1557, 1557-58 (1992)("[t]he Supreme Court only partially has defined the notion of ... 'academic freedom'"); Note, *Beyond "The Freedom to do Good and not Teach Evil": Professor's Academic Freedom Rights in Classrooms of Public Higher Education*, 26 Wake Forest L. Rev. 711, 733 (1991)("[d]ivergent views clearly exist among the courts"

regarding the concept of individual academic freedom regarding curriculum-related expression).

This case illustrates that "[t]hreats to individual academic freedom come from the state as well as the university administration." Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. Chi. L. Rev. 1317, 1321 (1992).

It is worth noting that the CBA of the Respondent University in this case, adopted the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP). Those principles state:

> Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.

AAUP, Policy Documents and Reports, 3 (1990).

More than one hundred and fifty academic and educational organizations and societies have endorsed the AAUP academic freedom standard. Id., 7-9. Unless the constitutional standing of *individual* academic freedom is defined by this Court, universities will continue to adopt the AAUP standards, lulling individual faculty into the belief that their such policies reflect established constitutional law.

Under the faulty reasoning of the Third Circuit in the decision below, public universities may pass such "academic freedom" policies, yet arbitrarily revoke them as to individual faculty members whose classroom materials espouse viewpoints that are unpopular or politically incorrect.

Such a result converts the promise of academic freedom under the First Amendment into an inviting, but empty, mirage.

## II. THERE IS A SPLIT OF AUTHORITY AS TO THE PROPER STANDARD OF REVIEW FOR THE CLASS-ROOM TEACHING OF A PROFESSOR IN A PUBLIC UNIVERSITY

### Introduction

The legal geography encompassing disputes over the academic freedom rights of public university professors is chaotically charted, and inconsistently mapped. A variety of differing tests have evolved in the six circuits that have addressed the issue.

### A. THE *HAZELWOOD* CASES

In *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988) this Court, in the context of the curriculum-related expressive conduct of high school students, ruled that such expression within a school newspaper involved a "non-public forum." 484 U.S. at 270. As such, the guiding principle applied to school officials who sought to restrict student speech was that such restrictions must be imposed in a "reasonable manner." *Id.*, at 270, citing *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37 (1983). Ruling that the appropriate test was whether the decision of the secondary school district was pursuant to a "reasonable pedagogical interest" (*Hazelwood*, *supra* at 273), this Court distinguished the speech in that case from the non-curriculum related expression present in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

This Court expressly raised the possibility, without deciding, that "school sponsored expressive activity at the college and university level" may not require the "same degree of deference" to the school's district decision-making as was applied in that case. *Hazelwood*, at 274, n 7.

## The *Hazelwood* Test Applied At The University Level

Cases in the Eleventh and First Circuits have applied the *Hazelwood* test to the curriculum-related expressive conduct of university professors.[7] *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) *cert.den.*, 505 U.S. 1218(1992); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994).

In *Bishop* the Court utilized the *Hazelwood* test but modified it by analyzing fact-specific factors such as the context of the professor's speech, the potential coercive affect on the students, the university's interest as an employer, and the interests of academic freedom. 926 F.2d at 1074-1075.

The Third Circuit recognized that its *per se* rule, which holds that professors have no First Amendment rights regarding curriculum-related expressive conduct, conflicted with that in *Bishop*, where that Court was noted to have found "that a public university's restrictions on a professor's in-class speech 'implicate[d] First Amendment freedoms.'" App. A-7.

In the *Bishop* case the Court cited approvingly to *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curium). *Bishop*, 926 F.2d 1073-1074. The *Mailloux* decision, in turn, had previously been harmonized with *Hazelwood* in *Ward v. Hickey*, 998 F.2d 448, 452-53 (1st Cir. 1993) (*Hazelwood/Mailloux* applied to curriculum-related speech of a high school teacher).

The *Hazelwood* test, as harmonized with *Mailloux* in *Ward v. Hickey* was applied to the in-class expressive conduct of a university professor in *Silva v. University of New Hampshire*, 888 F. Supp. 293, 313-314 (D.N.H. 1994). (Sexual harassment policy as applied to university professor's

---

[7] At trial in this case both parties submitted jury instructions to the trial court based on the *Hazelwood* test. The court rejected Petitioner's instructions, which sought to define the key phrase: "reasonable pedagogical interest." The Court of Appeals declined to reach the issue of the appropriateness of the jury instructions. App. A-6.

classroom speech is not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that "fails to take into account the nation's interest in academic freedom").[8]

**_Hazelwood_ Test Applied To High School Curriculum-Related Speech Of A Teacher**

Decisions from four circuits have applied *Hazelwood* to the curriculum-related expressive conduct of teachers in public high school. *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Silano v. Sag Harbour*, 42 F.3d 719 (2nd Cir. 1994); and *Miles v. Denver Public School*, 944 F.2d 773 (10th Cir. 1991).

In *Kirkland* the Court of Appeals applied *Hazelwood* in analyzing the conduct of a probationary high school teacher who disregarded the school district's process for approving a reading list.[9]

---

[8] The court in *Silva*, after noting a split among the various Courts of Appeals of several circuits with regard to whether the *Hazelwood* test applies to in-class professorial speech, or whether the tests developed under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), should apply, chose to also separately apply the *Connick-Pickering* tests. *Silva*, at 888 F. Supp. 314-17, 315, n. 16. The court found that a professor's in-class sexually explicit speech which offended several students was deemed to be a matter of "public concern" and was determined to "overwhelmingly" outweigh the interest of the university in restricting such speech pursuant to its sexual harassment policy.

[9] In the case at bar, the Third Circuit of Appeals cited the *Kirkland* decision in support of its conclusion that Dr. Edwards had no First Amendment rights to use certain curriculum materials. However, the Third Circuit reliance on Kirkland is misplaced. Unlike that case, the Respondent University here had delegated to the faculty the academic freedom to make curriculum decisions. See: App. A-7.

In *Ward v. Hickey*, *supra*, the First Circuit ruled that a prior First Circuit opinion (*Mailloux v. Kiley*, *supra*) was "consistent with the Supreme Court's test as set out in [*Hazelwood v.] Kuhlmeir*." 996 F.2d 453. The Court in *Ward*, while adopting the *Hazelwood* framework did not (in contrast to the Third Circuit in the case below) rule that teachers have *no* First Amendment rights with regard to curriculum-related speech.

In *Silano v. Sag Harbour*, *supra*, the court, treating a guest lecturer as a teacher[10] for First Amendment purposes, applied *Hazelwood*, and determined that the showing of pictures of bare-chested women was entirely "unnecessary to illustrate" the scientific phenomenon of "persistence of vision" which was the subject of the class. 42 F.3d at 723.

In *Miles v. Denver Public School*, *supra*, the Tenth Circuit Court of Appeals specifically considered, but rejected, the *Pickering* test, because "it does not address the significant interest of the State as educator." 944 F.2d 777. The court applied *Hazelwood* to find a "pedagogical interest" that justified discipline imposed on a ninth grade public school teacher for his in-class comments regarding rumors about the sexual activities of students on school grounds.

## B. THE CONNICK-PICKERING CASES

### Introduction

In *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court established the analytical framework for the First Amendment rights of public employees. Under the test developed in those cases, the inquiry is, first, whether the speech of the public employee is a matter of

---

[10] The Court noted that "Silano's lecture took place in a traditional classroom setting and was designed to impart a particular knowledge to the student participants .. " *Silano*, at 42 F.3d 723.

"public concern," and if so, then whether the free speech interests of the employee outweigh the interests of the employer in the operational efficiency of the public agency.

While this Court has yet to rule on the question of whether the *Connick-Pickering* test applies to *in-class, curriculum-related* speech of a professor, *Connick-Pickering* has been applied to *out-of-class* speech of a university professor.

In *Harleston v. Jeffries*, 513 U.S. 996 (1994), *cert.granted and vacating Jeffries v. Harleston*, 21 F.3d 1238, this Court reversed the judgment of the Court of Appeals for the Second Circuit in a case involving the *out-of-class* expression of a university professor who was removed from his department chairmanship as a result of his controversial statements. This Court instructed the Court of Appeals to reconsider its decision in light of *Waters v. Churchill*, 511 U.S. 661, (1994), a case that had further refined the *Connick-Pickering* analysis as applicable to the free speech rights of public employees.

### *Connick-Pickering* Test Applied At The University Level

The Sixth and Second Circuits have exclusively applied the *Connick-Pickering* test to in-class, curriculum-related expression of university professors: *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994).

In *Dambrot, supra*, the Court of Appeals held that a university coach's use[11] of a racial epithet was not a matter of "public concern" under *Connick-Pickering*. 55 F.3d 1185-91.

In *Blum, supra*, the Court of Appeals applied *Connick-Pickering* to hold that a university law professor who made both in-class and out-of-class comments on the legalization of

---

[11] The Sixth Circuit noted that the coach's "use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher." Dambrot, at 55 F.3d 1190.

marijuana and criticisms of national drug control policy, constituted comments on matters of public concern, and that the professor's free speech interest outweighed the interest of the university in the efficiency of providing educational services in it's law school.[12]

### *Connick-Pickering* Applied To High School Teachers: No Academic Freedom Rights Per Se

In *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998)(en banc), *cert.den.*, ___ U.S. ___ (1998), the Fourth Circuit applied *Connick-Pickering* to the selection, by a high school teacher, of a controversial play to hold that the editing of the play by the principle was appropriate because the teacher's selection of the play "does not present a matter of public concern and is nothing more than an ordinary employment dispute." 136 F.3d 368.

The end result of the reasoning in *Boring*, is that *any* curriculum-related selection of materials by a high school teacher is excluded from First Amendment protection as a matter of law whether under *Connick-Pickering* or under *Hazelwood*.

## C. THE "PER SE" RULE OF THE THIRD CIRCUIT

In the case at bar, the Third Circuit has flatly ruled that university professors have no First Amendment rights relating to the use of classroom materials or curriculum-related expression. *Edwards v. California University of Pennsylvania*, 156 F.3d 188 (3d Cir. 1998), *reh.den.*, ___ F.3d ___ (1998).

---

[12] At least one Court has noted that in *Blum*, "[t]he Second Circuit did not distinguish between Blum's in-class remarks and pedagogy on the one hand, and his out-of-class expressions, on the other. Instead, the Court simply applied the *Pickering* balancing test to Blum's speech as a whole." *Scallet v. Rosenblum*, 911 F. Supp. 999, 1010 n.10 (W.D.Va. 1996).

The Court of Appeals for the Third Circuit has held that the expressive conduct of Professor Edwards involved the role of the university as speaker. As such, under *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) the university may make arbitrary decisions, and may even commit viewpoint-based acts of censorship, with impunity. After reviewing *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court of Appeals concluded:

> In sum, caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to chose curriculum materials in contravention of the University's dictates.[13]

App. A-8 & 9.

The decision of the Third Circuit Court of Appeals is a final, and fatal blow, to the concepts of individual academic freedom of a professor. Under its reasoning, even the most outlandish and malicious acts of viewpoint-motivated censorship will be permitted under the reasoning the "the University can make content-based decisions when shaping its curriculum." App. A-8. It is possible, however, that the Third Circuit Court of Appeals understood the danger of giving a university limitless discretion to censor its faculty. Perhaps the Court was referring to the substantial evidence in the record of anti-religious bias by the university's administrators and department chairman when it noted:

> Nothing in our opinion should be read to mean that we condone all of the conduct of the University officials that was revealed at trial.[14]

---

[13] The "dictates" of the University were not neutral policies, but were, in fact, an academic act of view-point censorship against Petitioner's classroom material, at odds with the CBA, ill-defined, and overly broad.

[14] The Court noted statements by Petitioner's department chairman that petitioner was an "embarrassment to the department" (apparently referring to the religious content of his classroom materials) and suggested

## D. THE OTHER TESTS APPLIED TO CURRICULUM-RELATED EXPRESSION OF PROFESSORS IN THE CLASSROOM

The Courts of Appeal from the Ninth and Sixth Circuits have affirmed the in-class, curriculum-related academic freedom rights of college professors without reliance on either *Hazelwood* or the *Connick-Pickering* test.

In *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) the Court of Appeals held that a university professor's First Amendment rights were violated by an unconstitutionally vague sexual harassment policy as applied to his in-class speech, but did not utilize the tests under either *Hazelwood* or the *Connick-Pickering* cases.

The Sixth Circuit Court of Appeals, noting that "the Courts have also afforded substantial protection to the First Amendment freedoms of individual university professors," has held that a non-tenured university professor's free speech rights were violated when the university compelled him to change the grade of a student against his professional judgment. *Parate v. Isibor*, 868 F.2d 821, 826-830 (6th Cir. 1989)(citing neither *Hazelwood* nor the *Connick-Pickering* cases).

## E. THE "SUBSTANTIAL DEPARTURE" TEST

In *Regents of University of Michigan v. Ewing*, *supra*, this Court indicated that judges should overturn a "genuine academic decision" of a college or university only if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 474 U.S. 225. In *Regents of University of Michigan*, this principle of deference

---

that he would be better suited to teach at a "fundamentalist college" rather than a public university. App. A-4. The record is replete, however, with numerous other incidents of anti-religious bigotry leveled against Petitioner.

to institutional judgments was applied in the context of student expulsion decisions.

However, this Court extended the reach of the "substantial departure" test in *University of Pennsylvania v. EEOC*, 439 U.S. 182 (1990). In that case, this Court emphasized that deference to decision-making decisions of a university only applied to "legitimate academic judgments," and that the autonomy of an institution's academic decisions relating to the granting or denial of faculty tenure was not absolute. This Court held that the peer review materials of the tenure committee of the University of Pennsylvania were subject to subpoena in a faculty member's discrimination claim which alleged that denial of her tenure was based on factors of race and gender. 493 U.S. 199, citing *Regents of University of Michigan, supra.*

In the Third Circuit opinion below, the Court of Appeals, while citing *Regents of University of Michigan* for the proposition that institutional academic freedom is protected under the First Amendment, failed to also apply the rule in that case that academic decisions of a university can be challenged if they represent a "substantial departure" from excepted academic norms which evidence a lack of professional judgment.[15]

However, this Court has given no indication as to whether the "substantial departure" test should be applied also to disputes between a faculty member who, in accord with written policies, uses certain curriculum-related classroom materials and the university which then sanctions him for doing so because of the viewpoints of those materials. This case calls for clarification of that issue.

---

[15] At trial the Petitioner presented the testimony of three academic experts who cast substantial doubt as to the "professional" judgment of the Respondents. The Third Circuit opinion also contains an indication that the Court may have had its own suspicious. *See*, App. A-11.

## III. THE THIRD CIRCUIT OPINION PERMITS A PUBLIC UNIVERSITY TO COMMIT VIEWPOINT-CENSORSHIP AS TO UNPOPULAR VIEWPOINTS WHILE DELEGATING ACADEMIC FREEDOM RIGHTS TO POPULAR ONES

The Decision of the Court of Appeals in this case is inconsistent with the view of this Court that even a non-public forum in a public school setting, created by a collective bargaining agreement, may not be selectively permitted to some but denied to others in order "to discourage one viewpoint and advance another," nor can it be "motivated by a desire to suppress ... views." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49, n.9 (1983).

Fatal to the Court of Appeal's opinion in this case is its misreading of *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) as the basis for its result. *Rosenberger* distinguished between those occasions where "it is the University speaking ..." in which case the government can "regulate the content of what is or is not expressed ...," *supra*, at 515 U.S. 833-34 (cited at App. A-7 & 8), and those situations where it "expends funds to encourage a diversity of views from private speakers," in which case it "may not discriminate based on the viewpoint of private persons whose speech it facilitates ..." *Id.*

The decision below assumes, without analysis, that the respondent University was a government "speaker" (App. A-7 & 8) when it imposed its viewpoint curriculum ban against Dr. Edwards's use of classroom materials. However, the University here *did not* retain its absolute control over curriculum, because it had *relinquished* its position as "government speaker" when, through the written CBA, and through actual practice, it delegated to the individual faculty members the control over the content of what the professors would be "discussing" in the classroom and what "textbooks ... and other teaching aids ..." they would be using.

Because the University here made this general delegation of curriculum control to promote a "diversity of views" (*Rosenberger, supra*) among its faculty, the University is therefore prohibited from arbitrarily discriminating against one of those views merely because of the viewpoint of the material to be used. Further, it is clear that the University *itself* had treated its faculty more like "private speaker[s]" pursuant to their academic freedom policies, than mere government actors paid to articulate a specific government position, as was the case in *Rust v. Sullivan*, 500 U.S. 173 (1991).

Thus, Petitioner more closely resembles the private, non-government speakers in *Rosenberger*, than the government-subsidized (and government controlled) speaker in *Rust*.

Further, this Court noted in *Rust* that the university setting is an exception to the rule that permits government to control the contents of expression that it subsidizes:

> Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the first Amendment, *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-606, 17 L Ed 2d 629, 87 S Ct 675 (1967).

*Id.*, 500 U.S. 201.

In this case the University's own "primary guiding document," the CBA, portrays the individual faculty member as an autonomous speaker rather than a University spokesperson who is paid to merely promote a specific government position.

Thus, the Court of Appeal's presumption that the University was, itself, the "speaker" regarding curriculum choices it had delegated to individual professors, a delegation

accompanied by "extraordinary latitude" given to faculty members (according to the testimony of University President Armenti) is contrary to the written policy of the University embodied in the CBA, and collides with the history of academic freedom as espoused in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).[16]

Admittedly, there is debate among academic freedom scholars as to whether the First Amendment *requires* the university to delegate academic decisions to faculty, or prohibits it from the general power to undo those delegations based on viewpoint-neutral academic factors. Mark G. Yudof, *When Government Speaks: Politics, Law And Government Expression In America*, 135-38, 240-45 (1983).

However, there appears to be *no* scholarship that concludes that a revocation of a prior delegation of academic freedom authority may, consistent with the First Amendment, be accomplished "for the *purpose* of *censoring particular ideas*." David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law and Contemp. Probs., 276, n. 240 (1993) (citing Yudof, *Id.*, 243).

The Third Circuit opinion also collides with two recent Supreme Court articulations of the limits of viewpoint discrimination in non-public fora. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. ___, 118 S.Ct. 1633 (1998) this Court held that a television debate on a public station among contenders for an upcoming election, although determined to be a "nonpublic forum," nevertheless did not imply an absolute power of censorship by the

---

[16] It is also curious that the Third Circuit opinion cites *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Regents of Univ. v. Bakke*, 438 U.S. 265 (1978) (App. A-8) as its source for notions of academic freedom. Those cases involved student expulsion or admission, and did not deal with the expressive rights of teachers.

government, and that even speech in a non-public forum cannot be unreasonably censored based on viewpoint factors.

A few weeks after *Forbes* this Court decided *National Endowment for the Arts v. Finley*, 523 U.S. ___, 118 S.Ct. 2168, 66 U.S.L.W. 4586 (1998), ruling that the NEA grant process (which necessarily involved rejecting more grant requests than it was able to accept) did not resemble the "indiscriminate[] 'encourag[ing] [of] a diversity of views from private speakers'" (at 66 U.S.L.W. 4590) as was involved in *Rosenberger*. However, it was also emphasized that government may not "leverage its power into a penalty on disfavored viewpoints." 66 U.S.L.W. 4591.

Under this view, the Third Circuit decision must be reviewed by this Court, and reversed.

## CONCLUSION

For the foregoing reasons the Court should grant this Petition For Writ Of Certiorari.

Respectfully submitted,

OF COUNSEL:
Brad Dacus, Esq.
Pacific Justice Institute
9845 Horn Road #190
Sacramento, CA 95827
(916)857-6900

Craig L. Parshall
*Counsel of Record*
Law Office Of Craig L. Parshall
910 Princess Anne Street
Suite 202
Fredericksburg, VA 22401
(540)371-5427

December 11, 1998

## APPENDIX


A-1 Court of Appeals Opinion (August 10,1998)

B-1 Court of Appeals Judgment (August 10, 1998)

C-1 Court of Appeals Order Denying Petition for Rehearing (September 14,1998)

D-1 Summary Comparison of Syllabi from the Record

Filed August 10, 1998

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

---

No. 97-3285

---

DILAWAR M. EDWARDS, Ph.D.
Appellant
v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA;
JOHN PIERCE WATKINS, Ph.D., President;
NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPELL, Chairperson, Educational Studies Dept.

---

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 91-01668)

---

Argued: March 13, 1998

Before: STAPLETON and ALITO, *Circuit Judges*, and O'KELLEY, *District Judge*•

(Opinion Filed: August 10, 1998)

---

• Hon. William C. O'Kelly, United States Judge for the Northern District of Georgia, sitting by designation.

CRAIG L. PARSHALL (Argued)
Suite 202
910 Princess Anne Street
Fredericksburg, VA 22401

EUGENE ORLANDO, JR.
Orlando & Strahn
5341 Perkiomen Avenue
Reading, PA 19606

*Counsel for Appellant*

THOMAS F. HALLORAN, JR.
(Argued)
6th Floor
Office of Attorney General of
Pennsylvania
564 Forbes Avenue
Manor Complex
Pittsburgh, PA 15219

*Counsel for Appellees*

---

**OPINION OF THE COURT**

---

ALTO, Circuit Judge

Appellant Dilawar M. Edwards, a tenured professor at the California University of Pennsylvania, brought this action pursuant to 42 U.S.C. § 1983, alleging that the University and its officers ("the University") violated several of his constitutional rights. Specifically, Edwards claimed that the University deprived him of his rights to free speech, due process, and equal protection by restricting his choice of classroom materials, criticizing his teaching performance, and suspending him with pay for a portion of one academic term. In addition, Edwards alleged that the University retaliated against him for filing this lawsuit.

Prior to trial, the district court dismissed Edward's equal protection claim and granted summary judgment in favor of the University on Edwards's due process claim. The case then went to trial on Edwards's First Amendment and retaliation claims, and a jury returned a verdict for the University. On appeal, Edwards assigns as error: 1) the district court's First Amendment jury instruction; 2) the district court's grant of summary judgment on his due process claim; 3) the district court's dismissal of his equal protection claim; 4) the district court's ruling that the verdict was not against the great weight of the evidence; and 5) the district court's decision not to permit a third amended complaint. We affirm.

I.

During the time-period at issue in this case. Professor Edwards taught a course at the University entitled "Introduction to Educational Media" (IEM). Syllabi from the early 1980s indicated that the IEM course initially focused on how teachers can effectively use various classroom tools, such as projection equipment, chalkboard, photographs and films. *See* App. 1 at 299-306. Later syllabi prepared by Edwards, however, included a new emphasis on issues of bias, censorship, religion, and humanism, and Edwards listed numerous publications concerning these issues as required or suggested reading. *Id.* At 307-37.

In May 1989, one of Edwards students complained to University officials that Edwards had used the IEM class to advance religious ideas. On August 14, 1989, the University's Vice President for Academic Affairs, Nancy Nelson, wrote a letter to Edwards in which she outlined the student's concerns and indicated that a meeting on the issue would be held in the fall. Nelson met with Edwards and other school officials to discuss the complaint and, on November 28, 1989, Nelson wrote to Edwards and directed that he "cease and desist" from using "doctrinaire material[s]" of a religious nature. App. 1 at 366. Edwards appealed this

decision to the President of the University, John Pierce Watkins, and the two exchanged letters through July 1990. Watkins expressed his approval of Nelson's actions and directed Edwards to avoid advancing religious beliefs through his lectures and handouts. Dr. Edwards continued to teach the IEM course during the 1991 and 1992 school years.

In 1992, Professor David Campbell was named chair of the Education Department at the University. Upon assuming this position, Campbell became concerned that Edwards had "interjected something that didn't belong in the [IEM]" course [:] A district bias on religion and religious questions." App. II, Trial Tr. 2/13/97, at 38. After concluding that Edwards was teaching from a non-approved syllabus, Campbell brought the issue to the department faculty during the Spring 1993 term, and the faculty voted to reinstate an earlier version of the IEM syllabus. Relying on the earlier syllabus, Campbell revoked certain book orders that Edwards had made for the Fall 1993 semester and, when Edwards objected, Campbell told him that he could put the matter on the agenda for the September 1993 faculty meeting. Campbell testified that Edwards never asked that the matter be placed on the meeting's agenda.

In the weeks prior to the Fall 1993 term, Professor Edwards's schedule was rearranged, and he was assigned to teach an additional course — "Educational Tests and Measurements" (ETM) — that he had never taught. Edwards was dissatisfied with the change, and Campbell received complaints that Edwards failed to attend some of his ETM classes and walked out of others. At the September 1993 faculty meeting, Campbell and Edwards engaged in an exchange in which Campbell called Edwards an "embarrassment to the department" and made comments to the effect that Edwards might be better suited to a "fundamentalist college[]" than a "public university." App. 1 at 391, 400. A non-verbatim account of the meeting was distributed to all members of the Education Department.

In response to the student complaints about Edwards's ETM class, school administrators put together a packet of

materials that they wished to discuss with Edwards. The administration scheduled a meeting for Monday, October 25, 1993, but apparently did not mail the packet to Edwards until Friday, October 22, 1993. Upon arriving at the meeting, Edwards stated that he had not received any materials in the mail and he asked for additional time to prepare. App. I at 408-10. At this point, Nancy Nelson relieved Edwards of his duties, with pay, until he was ready to discuss the University's concerns. *Id.* at 411. Edwards remained suspended with pay for the remainder of the semester but returned to the classroom for the Spring 1994 term to teach two ETM courses and one IEM course.

Edwards initially brought suit against the University in September 1991, alleging violations of his First Amendment free speech rights, his Fourteenth Amendment due process rights, and his rights under the Establishment Clause. In October 1991, Edwards filed an amended complaint which included an equal protection claim. After his suspension in 1993, Edwards filed a second amended complaint which contained a free speech claim, a retaliation claim, a due process claim, and an equal protection claim. The district court granted summary judgment on Edwards's due process claim in January 1997, and the court denied Edwards's motion for reconsideration in February 1997. On February 11, 1997, the first day of trial, the district *sua sponte* dismissed Edward's equal protection claim for failure to state a claim and denied Edwards's motion to file a third amended complaint. The case then went to trial on Edwards's First Amendment and retaliation claims.

Before submitting the case to the jury, the district court held a conference on jury instructions and rejected much of Edwards's proposed First Amendment instruction. After the jury returned a verdict for the University, Edwards moved for a new trial. The district court denied Edwards's motion, and Edwards appealed.

II.

A.

Edwards first contends that the district court inadequately instructed the jury on the issue of whether the University violated his First Amendment rights by restricting his "choice of curriculum materials and the content and subjects of his classes." Appellant's Br. at 27. Although Edwards agrees with the standard given by the district court — that the University had to show that its actions were "reasonably related to a legitimate educational interest," App. IV, Trial Tr. Feb. 25, 1997, at 26 — Edwards argues that the district court did not adequately explain this standard and, thus, "permitted the jury to speculate on the parameters of freedom of speech." Appellant's Br. at 24. Specifically, Edwards contends that the district court failed to provide guidance in the following four areas: 1) the necessity of avoiding viewpoint discrimination; 2) the strength of a professor's academic freedom rights; 3) the correct legal standard regarding the discussion of religious issues in public classrooms; and 4) the existence of a professor's right to choose his curriculum materials absent an official school policy.

We do not find it necessary to determine whether the district court's instruction adequately defined the "reasonably related to a legitimate educational interest" standard because, as a threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom. This conclusion is compelled by our decision in *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172 (3d Cir. 1990), where we explained that "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." *Id.* at 1176. Consistent with this observation, we concluded that "[a]lthough a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is

protected, her in-class conduct is not." *Id.* (citation omitted).[1] Therefore, although Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom. *Accord Boring v. Buncombe County Bd. Of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (in banc) ("We agree... that the school, not the teacher, has the right to fix the curriculum."); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.") But *see Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (finding that a public university's restrictions on a professor's in-class speech "implicate[d] First Amendment freedoms").

Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker. The following passage from *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), addresses this issue in the university context:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when

---

[1] Edwards interprets *Bradley* as holding that "in the absence of an official existing school policy prohibiting" a professor from selected certain classroom materials, a professor has a First Amendment right to choose his curriculum materials. *See* Appellant's Br. at 28. This interpretation ignores: 1) the *Bradley* court's instruction that public school teachers must abide by "school policy or *dictates*" when choosing their curriculum. 910 F.2d at 1176 (emphasis added): 2) the court's broad conclusion that a public school teacher's "in class conduct is not" protected by the First Amendment, *id.*; and 3) the fact that the school in *Bradley*, like the University here, took action without establishing an official policy. *Id.* at 1174.

> it is the speaker or when it enlists private entities to convey its own message . . . . It does not follow, however, . . . . that viewpoint-based restrictions are proper when the University does not speak itself or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

*Id.* at 833-34. Since the University's actions in the instant case concerned the "content of the education it provides." *Id.* at 833, we find that the University was acting as speaker and was entitled to make content-based choices in restricting Edward's syllabus.

Edward's reliance on the principle of academic freedom does not affect our conclusion that the University can make content-based decisions when shaping its curriculum. The Supreme Court has explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226, n.12 (citations omitted). The "four essential freedoms" that constitute academic freedom have been described as a university's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quotations omitted).[2] In sum, caselaw from the Supreme

---

[2] Edwards contention that the Supreme Court has elsewhere defined academic freedom as the "principle that individual instructors are at liberty to teach that which they deem to be appropriate," Appellant's Br. at 31, is incorrect. The case cited for this proposition, *Edwards v. Aguillard*, 482 U.S. 578 (1987), reaches no such conclusion. Rather the passage relied upon by Edwards simply describes the conclusion of the court of appeals

Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University's dictates. Accordingly, we affirm the district court's decision not to grant a new trial on this issue.

B.

Edward's second contention is that the district court erred when it granted summary judgment for the University on his procedural due process claim. The district court initially ruled on this issue prior to trial, concluding that, "because Edwards was suspended with pay, he cannot prove that he was deprived of a property interest deserving due process guarantees." App. I at 138. Edwards moved for reconsideration on the ground that the district court's opinion did not adequately consider whether he had been deprived of a liberty interest. The district court denied Edward's motion, explaining that he had not "pleaded facts sufficient to make out a liberty interest claim regarding reputation." App. II. Feb 12, 1997 Trial Tr. At 12. We agree.

This court has previously held that "[s]tigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment," *Robb v. City of Philadelphia*, 733 F.2d. 286, 294 (3d Cir. 1984). *See also Strum v. Clark*, 835 F.2d 1009. 1012 (3d Cir. 1987) (explaining that the Supreme Court has required "both damage to reputation and the extinguishment of government employment as a predicate for due process protection."). Since it is undisputed that Edwards remained employed with pay at all times relevant to this case, his claim is barred by our decisions in *Robb* and *Strum*. While Edwards's temporary

---

in that case. *Id.* 586 n.6. At no point in *Aguillard*, which is an Establishment Clause case, does the Court define academic freedom for purposes of the Free Speech Clause.

removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment. Therefore, we will affirm the district court's grant of summary judgment on Edwards's due process claim.

C.

Edwards next contends that the district court improperly dismissed his equal protection claim. In making this argument, Edwards places considerable reliance on facts that came out at trial. *See* Appellant's Br. at 42: Appellant's Reply Br. at 18. However, the district court dismissed Edwards's equal protection claim prior to trial because Edwards's counsel admitted that the second amended complaint did not adequately allege an equal protection violation. *See* App. II., Feb. 11, 1997 Trial Tr. At 9-10, 74-75.[3] Under these circumstances, Edwards is not entitled to revive his equal protection claim on appeal.

---

[3] The relevant exchange between the district court and Edwards's trial counsel, Jack Parson, proceeded as follows:

| | |
|---|---|
| The Court: | What do think you need to do to make out an equal protection claim, don't you have to show persons similarly situated were treated in a different manner because of participation in a protected class? |
| Mr. Carson: | That's the criteria. |
| The Court: | Where's that allegation? |
| Mr. Carson: | In this amended complaint, it is not there, not specifically set out. |
| The Court: | This is the complaint. Okay. You are saying no equal protection argument in the second amended complaint? |
| Mr. Carson: | No, Your Honor. |
| The Court: | There is none? |
| Mr. Carson: | No. |

App. II. Feb 11, 1997 Trial Tr. at 9-10.

D.

Edwards's final two contentions — that the verdict was against the great weight of the evidence and that he should have been allowed to file a third amended complaint on the first day of the trial — are both without merit. Accordingly, we affirm the district court's resolution of both issues.

III.

In sum, we conclude: 1) that Professor Edwards does not have a First Amendment right to choose classroom materials and subjects in contravention of the University dictates; 2) that Edwards failed to state a procedural due process liberty claim because he did not allege a deprivation of employment; and 3) that the district court properly dismissed Edwards's equal protection claim after Edwards's own counsel conceded that the complaint failed to adequately state such a claim. We find Edwards's remaining arguments on appeal to be without merit. Accordingly, we affirm. We emphasize that we only pass on the narrow legal issues presented to us. Nothing in our opinion should be read to mean that we condone all of the conduct of the University officials that was revealed at trial.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

B-1

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No. 97-3285

DILAWAR M. EDWARDS, Ph. D.
Appellant

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph. D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed. D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (D.C. NO. 91-cv-01668)

Present: Stapleton, and Alito, Circuit Judges, and O'Kelley[1], District Judge*

**JUDGMENT**

This cause on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 13, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on April 16, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

---

[1] Honorable William C. O'Kelley, United States District Judge for the Northern District of Georgia, sitting by designation.

ATTEST:

/s/ P. Douglas Sifo
Clerk

Dated: August 10, 1998

C-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

97-3285

---

DILAWAR M. EDWARDS, Ph. D.,
Appellant,

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Student Dept.

---

SUR PETITION FOR REHEARING

---

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, LEWIS, and RENDELL, Circuit Judges, and O'KELLEY, District Judge*

The Petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/

Circuit Judge

DATED SEP 14 1998

---

* As to Panel rehearing only.

**FROM THE SYLLABI IN THE RECORD BEFORE THE COURT OF APPEALS**

**AT APP. VOL. I, 299-321**

**A COMPARISON OF THE LISTED TOPICS 1 THROUGH 11 IN UNIT THREE**

AS NUMBERED IN THE ***1980 & 1983 SYLLABI*** WITH THE CORRESPONDING LISTED TOPICS ***IN UNIT THREE*** IN THE ***1985*** *SYLLABUS* AND IN THE ***1990 SYLLABUS*** FOR EDF 304: INTRODUCTION TO EDUCATIONAL MEDIA

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**1. Television**

UNIT THREE: **(1985) 3-credit Syllabus:**

Intro to television: types of transmissions; kinds of programming; sources of fund. Television: ETV, ITV, CCTV, CATV, ITFS, The Fourth Network; Instructor-Directed Television. Implications of commercial television programming and values for the educator/teacher/student.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Broadcast Television: types of transmissions: kinds of programming; sources of funding, Television: ETV, ITV, CCTV, CATV, ITFS, The Fourth Network; Instructor Directed Television Videotape Recording and Videodiscs Implications of commercial television programming and values for the educator/ teacher/student.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**2. Principles of Video Tape Recording**

UNIT THREE: **(1985) 3 credit Syllabus:**

**Principles of Video Tape Recording; Microteaching**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**3. Textbook Evaluation**

UNIT THREE: **(1985) 3-credit Syllabus:**

Textbook Evaluation, Censorship, Book-burning, the First Amendment and print and non-print media.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Textbook Evaluation, Censorship, indoctrination, thought control, academic freedom, the First Amendment, and print and non-print media materials and textbooks.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**4. Future Trends in Education**

UNIT THREE: (1985) 3-credit Syllabus:

Future Trends in Educational Media and Technology.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Future Trends in Educational Media and Technology.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**5. Future Trends in Media**

UNIT THREE: **(1985)3-credit Syllabus:**

Future Trends in Media selection, utilization and evaluation.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Future Trends in Media selection, utilization and evaluation.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**6. Criteria and Guidelines To Be Used In Media Selection**

**UNIT THREE: (1985) 3-credit Syllabus:**

Criteria and Guidelines to be used in Media selection and evaluation.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Criteria and Guidelines to be used in Media evaluation and selection.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**7. Pennsylvania's Intermediate Unit**

UNIT THREE: (1985) 3-credit Syllabus:

Pennsylvania's Intermediate Units, ERIC, microfilm, microcards, microfiche.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Pennsylvania's Intermediate Units, ERIC, microfilm, microcards, microfiche.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**8. Community Resources**

UNIT THREE: (1985) 3-credit Syllabus:

Community Resources, Media Packages, Media Products and Programmed Instruction.

UNIT THREE: (1990) 3-credit Syllabus:
Community Resources, Media Packages, Media Products and Programmed Instruction.

**UNITED THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**9. Free and Inexpensive Materials**

UNIT THREE: **(1985) 3-credit Syllabus:**
Free and Inexpensive Materials; Sponsored materials; Biases in materials.

**UNIT THREE: (1990) 3-credit Syllabus:**
**Free and Inexpensive Materials; Sponsored materials; Biases in materials.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**10. Teacher Evaluation Forms; Reference; Interviews**

UNIT THREE: **(1985) 3-credit Syllabus:**
Selection and Evaluation Forms and techniques. Discussion on criteria-formulation and application.

**UNIT THREE: (1990) 3-credit Syllabus:**
**Evaluation and Selection Forms and techniques. Discussion on criteria formulation and application.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**11. Course Evaluation**

UNIT THREE: **(1985) 3-credit Syllabus:**

Test #3 and Essay Test
Final Laboratory Test

**UNIT THREE: (1990) 3-credit Syllabus:**

Interactive Learning Media.
Copyright rules. AECT Code of
Professional Ethics.
Test #3 and Essay Test
Final Laboratory Test

Source: App. Vo. I, 299-302, 303-306
307-319, 321-338; App. Vol. IV,
Tr. Feb. 24, 5-9, 23-24.